COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000526-DR

NORTON HEALTHCARE, INC. — APPELLANT

Court of Appeals
Case No. 2012-CA-000217-MR

v.

Appeal from Jefferson Circuit Court
Case No. 08-CI-002274

LUAL A. DENG
(formerly known as JACOB L. AKER) — APPELLEE

BRIEF OF APPELLANT

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class U.S. Mail, postage prepaid: Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Audra J. Eckerle, Jefferson Circuit Judge, Division Seven, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, KY 40202-4724; and Everett C. Hoffman, Priddy, Cutler, Miller & Meade, PLLC, 800 Republic Building, 429 W. Muhammad Ali Blvd., Louisville, KY 40202 on this 13th day of October, 2014.

Jeremy S. Rogers

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INTRODUCTION

This case involves a claim of retaliation under the Kentucky Civil Rights Act, arising solely from one alleged statement by an attorney for Appellant Norton Healthcare, Inc. ("Norton") to an attorney for Appellee Lual Deng, formerly known as Jacob Aker ("Aker"). The alleged statement was that Norton would not consider hiring Aker for an unspecified job in exchange for Aker's dismissal of a pending lawsuit in which Aker claimed that his recent employment termination was racially discriminatory.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant Norton Healthcare, Inc. desires oral argument. Appellant believes that oral argument would assist the Court in resolving the important legal and policy questions raised in this appeal concerning the use of attorneys' settlement discussions as the sole basis for retaliation claims under the Kentucky Civil Rights Act.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. NORTON'S TERMINATION OF AKER'S EMPLOYMENT.

Appellee Lual Deng, formerly known as Jacob Aker ("Aker"),[1] was employed by Appellant Norton Healthcare, Inc. ("Norton") as a Patient Care Associate at Norton Audubon Hospital. (R. 76, 81 Aker Dep., p. 71, 73, 91.) In August 2007, Aker was involved in an incident with several nurses who perceived his comments to be threatening or intimidating. Norton's human resources department investigated the incident and determined that Aker's conduct warranted termination of his employment. (R. 122, Aker Counseling Record, 8/14/2007.)

Aker appealed this decision through Norton's internal grievance process. (R. 135-141, P. Taylor Depo., pp. 23-27, 29, 34.) On September 28, 2007, a Grievance Resolution Team recommended that the matter be treated as a lower level offense rather than as an immediately-terminable offense. (Id.) The Team also recommended that Aker undergo Employee Assistance Program counseling and suggested that Norton give Aker an opportunity to seek another position in a different Norton unit or location. (Id.) Norton placed Aker on administrative leave and gave him until November 28, 2007 to find another position within the Norton system as in *internal* candidate. Aker met with a retention manager, Jason Coffey, and applied for three positions as an internal candidate but was not selected for any of the positions. (R. 147-148, Coffey Dep., pp. 23-24, 27; R. 157-160, Coffey Dep., pp. 69, 82-83, 85.)

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[1] Appellant was known as Jacob Aker during his employment at Norton, and he has been referred to as "Aker" throughout this litigation. To maintain consistency and avoid confusion, Norton continues to refer to him in this Brief as "Aker."

On November 27, 2007, Coffey attempted to contact Aker to follow up on the job search and to remind Aker that he would have to begin applying for jobs as an *external* candidate after the exhaustion of his administrative leave on November 28. (R. 158-159, Coffey Dep., pp. 73-74.) Aker applied for no other positions. Aker's employment with Norton ended on November 28, 2007 when his administrative leave expired.

Attorney Erwin A. Sherman ("Sherman") began advising Aker at some point after the termination of his employment.[2] According to Sherman's affidavit, "[f]or approximately 22 months, from December 21, 2007, until March 6, 2008, I advised Mr. Jacob Aker (now Lual Deng) with regard to his efforts to return to work at Norton HealthCare." (Sherman Aff. at ¶ 3.)[3] In a December 21, 2007 letter to Norton's human resources department, Sherman wrote that Aker "has waited an inordinate amount of time to be advised as to when he may return to work after his appeal from a wrongful termination." (Id. at Exh. 1, 12/21/07 ltr.) On January 11, 2008, Norton's Assistant General Counsel Thomas E. Powell, II ("Powell") wrote to Sherman explaining that Aker had not followed through on his responsibility to apply for other positions through Norton's retention program. (Id. at Exh. 2, 1/11/08 ltr.)

II. AKER'S *PRO SE* COMPLAINT AND THE ATTORNEYS' SETTLEMENT DISCUSSION.

On February 27, 2008, Aker filed suit *pro se* in Jefferson Circuit Court, claiming that his termination constituted race discrimination. (See R. 1-2, Compl.) Although Sherman never entered an appearance for Aker in the lawsuit, he telephoned Powell on March 5, 2008 – one week after the lawsuit was filed. (Sherman Aff. at ¶7.) According

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[2] R. 192, *et seq.*, Plf's Resp. to Summ. J. Mot., at Exh. 10. A copy of Sherman's Affidavit, with its three exhibits, is attached at App'x Tab 3.

[3] The noted time period is actually approximately 10 weeks – not 22 months.

to Sherman, Powell said that Norton would not consider Aker for a position in exchange for Aker's dismissal of the lawsuit. (See id. at ¶ 7.) The next day, Sherman sent a letter to Powell stating,

> To confirm our brief conversation today, you said because Mr. Akers [sic] filed suit you will not consider him for a position, even if he were to dismiss the case he filed pro-bono [sic].
>
> He did as you directed him, left three unreturned messages and went to the office of a Mr. Jeffrey, [sic][4] waited again and left his name and phone number. No response.
>
> The phone number he left is the one he has had for three years. You said the number he gave was incorrect or he couldn't be contacted on it. You seem to be more interested in litigating and supplying business to a law firm -- possibly the one with which you were associated, than seeing that a wrong is righted as you were ordered to do.
>
> I find your attitude to be cavalier toward a poor person trying to be rehired when it has been established he was wrongfully terminated. I will not represent him further, as I erroneously believed I could help him see that Norton did as required and rehire him. Your attitude indicates you did not learn as a nonequity partner at Greenebaum to seek justice.

(Id. at Exh. 3, 3/6/08 ltr.)

The letter makes clear that Sherman suggested that Aker be considered for an unspecified "position" at Norton in exchange for his dismissal of the lawsuit. (Id.) However, nothing in the record supports Sherman's assertions that it was "established" that Aker had been "wrongfully terminated" or that Norton had been "ordered" or otherwise "required" to rehire Aker or to hire him in any other unspecified "position."

In his deposition, Aker testified that he overheard the alleged conversation between Sherman and Powell via speakerphone in Sherman's office. (Aker Depo., p.

[4] Presumably, this was intended to refer to Jason Coffey.

264.)[5] According to Aker, Powell said "even though Mr. Aker drop the case, we're not going to hire him back." (Id. at 264.)

III. PROCEDURAL HISTORY.

A. Aker's Amended Complaint.

The lawsuit was essentially dormant for the remainder of 2008 and 2009. In February 2010, Aker obtained new legal counsel and filed an Amended Complaint, asserting claims of breach of contract and violation of the Kentucky Civil Rights Act ("KCRA"). (R. 16-20, Am. Compl.) Aker claimed that Norton's failure to reinstate his employment was a violation of the Norton Grievance Team's recommendation and, therefore, constituted a breach of contract. (Id. at ¶ 19.) Further, Aker claimed that the termination of his employment in 2007 constituted discrimination and retaliation. (Id.) Aker also alleged in his Amended Complaint that Norton's continuing failure to reinstate him after February 27, 2008 was in further retaliation for his filing the original *pro se* Complaint. (See id. at ¶¶ 17-18, 21-24.)

B. Summary Judgment Proceedings.

After discovery was completed, Norton moved for summary judgment. In his opposition to Norton's motion, Aker did not claim to have applied for employment in any position at Norton after filing his *pro se* Complaint. (See R. 192, *et seq.*, 10/25/11 Plf. Resp. to Mot. for Summ. J.) Rather, Aker argued extensively that Norton was already contractually obligated to reinstate his employment because of the Grievance Team's recommendation. (See id. at 19-22.) Aker argued that his "second retaliation claim is that

[5] The March 28, 2012 Certification of Record on Appeal indicates that the full deposition transcripts, including Aker's, were made part of the record but were not separately assigned page numbers.

Norton based its continued refusal to reinstate his employment on the fact that he had filed this action against Norton, in February 2008." (Id. at 27) (emphasis added). Aker claimed that Norton "refused to consider him further for reinstatement" because of his *pro se* Complaint. (Id. at 28) (emphasis added).

Aker acknowledged in his deposition that he understood the Grievance Team's recommendation to involve Aker *applying* for a position different than the position from which he had been terminated. (Aker Depo., pp. 175, 191.) Yet, at no point in the summary judgment briefing (or otherwise in the litigation) did Aker provide any evidence that he applied for a position with Norton after filing suit. (See R. 192, *et seq.*, Plf. Resp. to Mot. for Summ. J.) Nor did Aker ever specify what position he allegedly sought, with which Norton hospital or other Norton unit the position was connected, or whether Aker was qualified for any such position. (See id.) Nor did Aker provide any evidence that any such position was available, vacant, or subsequently filled by any other applicant. (Id.)

On January 5, 2012, the Circuit Court granted summary judgment, dismissing all of Aker's claims. (R. 317-327, Op. & Ord.)[6] In addition to dismissing Aker's contract claim and KCRA claims arising from his termination, the Circuit Court rejected Aker's claim of retaliation arising from the alleged statement that Powell made to Sherman. The Circuit Court reasoned that Aker's employment had already been terminated by the time of the alleged statement, he was not a Norton employee and had not applied for employment, and Norton had no contractual or other obligation to rehire him. Thus, the Circuit Court held that Norton's "declination to rehire him is not actionable." (Id. at 10.)

[6] A copy of the Circuit Court's Opinion and Order is attached hereto at App'x Tab 2.

C. Court of Appeals Proceedings.

i. *Aker's Appellate Arguments.*

Aker appealed the Circuit Court's judgment. In his February 7, 2012 prehearing statement, Aker set forth the "facts and issues" to be litigated on appeal:

> The Plaintiff claims that the Defendant's termination of, and subsequent refusal to reinstate, his employment constituted (1) a breach of the Defendant's contractual obligations to the Plaintiff; (2) discrimination on the basis of race, color and national origin in violation of KRS 344.040; and (3) retaliation for his prior efforts to report and oppose discriminatory acts in violation of KRS 344.280. The Circuit Court granted the Defendant's motion for summary judgement [sic] as to all of the Plaintiff's claims.

(2/7/12 prehearing stmt.) (emphasis added).[7] Aker's prehearing statement made no mention either of Powell's alleged statement to Sherman or of Aker's claim of post-lawsuit retaliation based upon the alleged statement. (See id.)

In his Appellant Brief, Aker continued to argue that the Grievance Team's recommendation somehow entitled him to be hired to another unspecified position at an unspecified Norton location. Aker contended that "Norton ignored the decision of its Grievance Resolution Team and refused to reinstate the Appellant's employment." (Aker Appellant Brf. to Ct. of App., p. 1.) Aker also cited his Amended Complaint for the contention that Norton's actions, including its "refusal to reinstate him" were in retaliation for Aker's actions *prior* to filing the lawsuit. (Id. at 2.)

In his Reply Brief to the Court of Appeals, Aker conceded that it is "literally true" that he never applied for a position with Norton after November 28, 2007. (Aker Reply Brf. to Ct. of App., p. 3.) Aker argued that Norton was aware of his "continuing claim to reinstatement in a new position" both before and after Aker filed his *pro se* Complaint.

[7] A copy of the prehearing statement is attached at App'x Tab 4.

(Id. at 4) (emphasis added). However, in the same Reply Brief, Aker contended that the alleged conversation between Powell and Sherman should not be excluded as a settlement discussion because "Aker does not offer Powell's statement to support any disputed legal claim pending at that time — it is being offered to establish a new claim of retaliation, which did not even exist, and therefore could not be the subject of compromise negotiations, until after Powell made his statement." (Id. at 5.)

ii. *The Court of Appeals Opinion.*

In its July 5, 2013 Opinion, the Court of Appeals unanimously affirmed the Circuit Court's summary judgment as to Aker's KCRA discrimination claim and retaliation claim arising from his termination. (See 7/5/13 Ct. of App. Op.)[8] However, the panel was split on the issue of Aker's post-lawsuit retaliation theory.

The majority held that the alleged comment by Powell was admissible despite KRE 408, the Rule of Evidence which generally excludes statements made as part of settlement negotiations. (Id., p. 15, fn. 1.) The majority reasoned that the alleged statement "was not made as part of a settlement negotiation, but was a statement declaring Norton's *refusal to consider* a compromise or settlement." (Id.) (emphasis added). The majority also held that KRE 408 would not exclude the alleged statement because Aker sought to use it not as "proof of the validity of his underlying discrimination claim, but in support of his separate retaliation claim." (Id.)

The Court of Appeals majority also rejected the argument that Aker failed to make a *prima facie* retaliation claim by showing any "adverse employment action" in connection with the alleged statement. The Court of Appeals acknowledged that Aker

[8] A copy of the Court of Appeals Opinion is attached at App'x Tab 1.

did not actually apply for any position with Norton after filing suit. However, the Court of Appeals majority held that Aker was not required to apply for employment in this instance because this was a "rare case" in which the "futile gesture doctrine" applies. (Id. at 17) (*citing*, *inter alia*, Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 629 (10th Cir. 2012)). The majority held that "[b]eing told by a Vice President and the General Counsel[9] of Norton that Aker would not be considered for a position, even if he dismissed the case, is a perfect demonstration of the futility in filing an application." (Id. at 17.)

The majority also wrote that "[i]t appears that there were other jobs that [Aker] was qualified for." (Id. at 18) (emphasis added). However, there is no indication as to what, if anything, the majority relied upon for this statement. The parties cited no evidence in their appellate briefs or elsewhere in the record that, at the time of Powell's alleged statement, there was any available job at Norton for which Aker was qualified.

Judge Maze issued a separate opinion, concurring in part and dissenting in part. In the dissent, he wrote,

> The majority presents a compelling argument that Aker could establish futility under the circumstances presented in this case. However, Aker has never made such a claim, either before this Court or before the trial court. Rather, he has argued only that direct evidence of a retaliatory motive, without more, is sufficient to establish a *prima facie* case for retaliation. As a question of law, this Court must acknowledge established precedent which allows a showing of futility to satisfy the required element of Aker's *prima facie* case. But on the issue of fact, Aker bears the burden of raising the issue and directing the Court to facts in the record which would support a finding of futility. Since he has failed to meet either burden, I would decline to address this issue further and I would affirm the trial court's decision to grant summary judgment.

[9] Powell is actually Associate Vice President and Assistant General Counsel.

(Id. at 19-20.)[10]

In August 2013, Norton moved for discretionary review, which this Court granted by Order dated June 11, 2014. Aker filed a cross-motion for discretionary review, but the Court denied that motion on August 13, 2014. Thus, the only claim on review before the Court is Aker's KCRA retaliation claim arising from Powell's alleged statement to Sherman after Aker had filed this lawsuit.

ARGUMENT

I. NORTON'S ARGUMENTS WERE PRESERVED FOR REVIEW.

After the close of discovery, Norton moved for summary judgment on all of Aker's claims, including the post-lawsuit retaliation claim arising from the alleged statement that Powell made to Sherman. (R. 43-150, 9/16/11 Mem. in Supp. of Def.'s Mot. for Summ. J.; R. 288-303, 11/16/11 Reply in Supp. of Def.'s Mot. for Summ. J.) In its briefs, Norton argued that Aker could not establish a *prima facie* case of retaliation. Norton also argued that Powell's alleged statement to Sherman was made in the context of a settlement discussion. The trial court considered these arguments and agreed, holding that Norton's "declination to rehire [Aker] is not actionable." (R. 317-328, Op. & Ord.)

In its Appellee Brief to the Court of Appeals, Norton argued again that Powell's alleged statement to Sherman, made in the context of settlement discussion between attorneys, could not support a retaliation claim and was inadmissible under KRE 408. (Appellee Brf. to Ct. of App., pp. 14-23.) Further, Norton argued that Aker could not establish a claim of retaliation based on Powell's alleged statement because he could not

[10] In fact, the Court of Appeals Opinion was the first time in this litigation that the futile gesture doctrine had been mentioned at all.

establish causation or an adverse employment action as Aker did nothing more than have his attorney express a general interest in returning to work in an unspecified job. (Id.) In its Motion for Discretionary Review, Norton raised the same arguments. (See Mot. for D.R.) Therefore, Norton preserved its arguments for appellate review by this Court in accordance with CR 76.12(4).

II. THE COURT OF APPEALS ERRED BY RAISING ISSUES THAT WERE NEVER RAISED BEFORE THE TRIAL COURT.

The Court of Appeals raised the "futile gesture" doctrine argument *sua sponte* on Aker's behalf. That issue was neither presented to the Circuit Court nor argued to the Court of Appeals. Accordingly, the issue was waived by Aker, and the Court of Appeals erred by reversing the Circuit Court's judgment on that basis.

As a general rule, "[a]n appellate court 'is without authority to review issues not raised in or decided by the trial court.'" Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705, 734 (Ky. 2009) (internal citations omitted). The primary reason for this rule is "to give the trial court a reasonable opportunity to consider the question ... so that any problem may be properly resolved at that time, possibly avoiding the need for an appeal." Fischer v. Fischer, 348 S.W.3d 582, 588 (Ky. 2011); see also Hutchings v. Louisville Trust Co., 276 S.W.2d 461, 466 (Ky. 1955). This rule also applies "to bar a party from challenging a necessary element of a cause of action for the first time on appeal." Fischer, 348 S.W.3d at 588 (internal citations omitted).

Moreover, this Court has held that "[i]f the specific ground complained of on appeal is not given at the trial court," then that party has "failed to preserve his thinking should the trial court rule against him." Fischer, 348 S.W.3d at 588–589. Accordingly, specific grounds not raised before the trial court cannot support a reversal on appeal

absent palpable error. Id. at 588–589. Under the palpable error standard, "an unpreserved error may be noticed on appeal only if the error is 'palpable' and 'affects the substantial rights of a party,' and even then relief is appropriate only 'upon a determination that manifest injustice has resulted from the error.'" Wright v. House of Imps., Inc., 381 S.W.3d 209, 212 (Ky. 2014) (citing CR 61.02). 'Palpable errors' are "limited, namely, to errors committed by the court, rather than pure omissions by the attorneys or litigants." Fischer, 348 S.W.3d at 587 (internal citations omitted).

In short, when an appellate court "determines to reverse a trial court, it cannot do so on an unpreserved legal ground unless it finds palpable error, because the trial court has not had a fair opportunity to rule on the legal question." Fischer, 348 S.W.3d at 590. See also Dean v. Commonwealth Bank & Trust Co., 434 S.W.3d 489, 496 (Ky. 2014) (raising an issue "for the first time on appeal in support of reversing the lower court, [ ] is not allowed," as opposed to raising a "previously un-raised point of law that would support affirming, which is allowed."); Am. Gen. Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 549 (Ky. 2008) (appellate court "will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on timely motion.").

Here, Aker never raised the "futile gesture" argument to excuse his failure to apply for a job with Norton. Instead, Aker consistently maintained that he was contractually entitled to be re-hired. This was the reason for Judge Maze's dissent. (See 7/5/13 Op., p. 19.) Given the specificity of the grounds Aker argued to the Circuit Court, it was "reasonable for the trial court to assume that they were the only grounds he wanted considered." Fischer, 348 S.W.3d at 589. Both the Circuit Court and Norton were deprived of the opportunity to address the "futile gesture" issue on summary judgment.

The Court of Appeals erred by reversing the judgment based upon on an argument it raised *sua sponte* and which was not presented or preserved by Aker. In turn, Aker cannot identify any 'palpable error' to support the Court of Appeals' reversal because he simply failed to raise the "futile gesture" argument. The portion of the Court of Appeals decision on review should therefore be reversed.

III. STATEMENTS MADE BY LAWYERS IN DISCUSSIONS ABOUT SETTLING A DISCRIMINATION CLAIM SHOULD NOT BE ADMISSIBLE AS THE SOLE BASIS FOR A COMPANION RETALIATION CLAIM.

This Court should reverse the Court of Appeals' holding that Powell's alleged statement to Sherman is admissible. Kentucky Rule of Evidence 408 generally prohibits the admissibility of "conduct or statements made in compromise negotiations." This Court has never addressed the precise question presented here, but the Court's decisions strongly support the inadmissibility of such a settlement discussion. Likewise, other courts have held that the failure to settle an existing discrimination claim cannot form the sole basis for a new claim of retaliation.

A. History and Purpose of Rule 408.

Rule 408 codified a long line of common law decisions excluding settlement discussions. See, e.g., Wolf Creek Collieries Company v. Davis, 441 S.W.2d 401 (Ky. 1969) (holding that evidence of an offer of settlement is "inadmissible"); Dinwiddie v. Urban Renewal and Comm. Dev't Agency, 393 S.W.2d 872 (Ky. App. 1965) (same); Whitney v. Penick, 136 S.W.2d 570 (Ky. App. 1940) (same). Before the Rule's enactment, it was well-established law in Kentucky that "an offer of compromise is not admissible as evidence" in a case. See Green River Elec. Corp. v. Nantz, 894 S.W.2d

643, 646 (Ky. App. 1995) (*quoting* Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.50 p. 134 (3d ed. 1993)).

In fact, Kentucky law has long favored "settlement of controversies out of court, and will not permit an offer of compromise to be used as a weapon against the party making the offer." Elam v. Woolery, 258 S.W.2d 452, 453 (Ky. 1953). The policy behind this common law rule has been consistent for more than a century: "statements made by either party on propositions of compromise of a lawsuit cannot be proved against him unless the compromise is effected, because he may have and is presumed to have made the admission in the hope of having an amicable settlement of the impending controversy." McKee v. McKee, 9 Ky. Op. 805, 807, 1878 Ky. LEXIS 205 (Ky. 1878); see also Powers' Adm'r v. Wiley, 241 Ky. 645, 44 S.W.2d 591 (Ky. 1931) ("if a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him, many settlements would not be made.") (emphasis added).

Rule 408 was enacted to promote the "public policy favoring the compromise and settlement of disputes." Robert G. Lawson, Modifying the Kentucky Rules of Evidence - A Separation of Powers Issue, 88 Ky. L.J. 525, 583 (1999) (*citing* KRE 408) (other internal citations omitted). The Rule itself provides that evidence of:

> (1) Furnishing or offering or promising to furnish; or
> (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

KRE 408.[11] By its plain language, it is clear that "Rule 408 acts as a kind of privilege for communications made during settlement negotiations and is calculated to encourage conduct outside the courtroom." 88 Ky. L.J. at 583 (internal citations omitted).

The language of Federal Rule of Evidence 408 is nearly identical to KRE 408. Although under the federal rule, conduct or statements made during compromise negotiations about the claim are admissible "when offered in a *criminal* case," the Notes of the Advisory Committee make clear that "*statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation*, when offered to prove liability for, invalidity of, or amount of those claims." See FRE 408, Notes of the Advisory Committee (emphasis added). The rationale for this distinction is that "inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408." Id.

The Court of Appeals has observed that KRE 408 was promulgated to reflect that "[t]he law has long fostered voluntary dispute resolution by protecting against the possibility that a compromise or offer of compromise might be used to the disadvantage of a party in subsequent litigation." Nantz, 894 S.W.2d at 646 (other internal citations omitted) (emphasis added). The policy reasons underlying KRE 408 and the pre-existing common law rule are both clear and compelling. As Justice Abramson noted in a dissenting opinion in Commonwealth v. Chauvin, 316 S.W.3d 279 (Ky. 2010),

[11] The Rule does not require the exclusion of "evidence otherwise discoverable" or evidence "offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." KRE 408.

"[e]vidence of plea negotiations, KRE 410, or settlement discussions, KRE 408, is not admissible, for example, not because it is unreliable, but to permit such negotiations to proceed forthrightly." Id. at 303 (Abramson, J., dissenting).

Similarly, the U.S. Court of Appeals for the Sixth Circuit has noted that Federal Rule 408 must allow for "open discussion" so parties can "make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts" because, "[w]ithout a privilege, parties would more often forego negotiations for the relative formality of trial." Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003). The inability of parties to speak freely in negotiations would undermine the "entire negotiation process ... and the judicial efficiency it fosters [would be] lost." Id.

Reinforcing this longstanding common law rule, the General Assembly enacted KRS 454.011, which expresses that the public policy of Kentucky is "to encourage the peaceable resolution of disputes and the early, voluntary settlement of litigation through negotiation and mediation." Consistent with our long-held and compelling public policy of encouraging settlement discussions, this Court should hold that an alleged statement made in the course of a settlement discussion concerning a KCRA discrimination claim is inadmissible and cannot form the sole basis for a retaliation claim.

B. Aker's Only Evidence of Retaliation in this Case Cannot Support a *Prima Facie* Case.

Kentucky courts have not addressed the precise issue presented in this case, but the history and public policy behind KRE 408 support the conclusion that Aker cannot use Powell's alleged statement as the sole basis for a claim of retaliation. Powell's alleged statement was made in the context of settlement discussions initiated by Sherman,

Aker's attorney, approximately two weeks after the lawsuit was filed. Sherman's affidavit itself demonstrates that the purpose of the discussion was to consider whether Norton would be willing to consider hiring Aker in exchange for dismissal of the lawsuit. (Sherman Aff., ¶ 7.) Sherman's own words clearly show that this alleged conversation was an attempt between two lawyers to resolve the lawsuit. Sherman's suggestion that Norton consider hiring Aker in exchange for dismissing Aker's *pro se* lawsuit is, indisputably, an attempt at "negotiation" as contemplated by KRE 408, as was Powell's alleged response.

The Court of Appeals' statement that Powell's alleged remark was not made in a settlement negotiation, "but was a statement declaring Norton's refusal to consider a compromise or settlement," is simply incorrect. (7/5/13 Ky. App. Op., p. 15 fn. 1.) Neither the longstanding common law rule nor KRE 408 is so narrow as to apply only when a settlement is actually reached or only when a party extends a specific settlement offer or demand of a certain threshold. By its plain language KRE 408 applies to "attempting to compromise a claim which was disputed" and "statements made in compromise negotiations." (Emphasis added.)

The Court of Appeals analysis on this issue begs the question of what kind of statement, offer or demand would be required of Norton (through Powell) in order to qualify the discussion for purposes of KRE 408. Was Powell required to make a counteroffer? Would the discussion qualify if Powell had rejected reinstatement but instead had offered a certain amount of money? Would it make a difference if Powell was Norton's *outside* legal counsel? These questions are merely illustrative of the broad

difficulty that the Court of Appeals decision creates in terms of how discussions about settling employment discrimination claims risks engendering new retaliation claims.[12]

The Court of Appeals also employed a faulty analysis in holding that Powell's alleged statement was not offered as proof in the discrimination claim but, instead, was offered to prove a separate retaliation claim. (7/5/13 Ky. App. Op., p. 15 fn. 1.) Aker made claims of discrimination, retaliation and breach of contract all in connection with his termination. Aker also consistently maintained that Powell's alleged statement was proof of a retaliatory animus in those claims relating to Norton's "continued" refusal to consider Aker "further" for reinstatement. (R. 192, *et seq.*, 10/25/11 Plf. Resp. to Mot. for Summ. J., pp. 27-28.) In this case, the claims of discrimination and retaliation are very closely, if not inextricably, intertwined.

Interconnected issues of alleged wrongful termination and alleged retaliatory failure-to-rehire are not uncommon; reinstatement is a potential remedy in an employment discrimination case under the KCRA. See Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 806 (Ky. 2004). In fact, reinstatement, rather than front pay, "remains the preferable remedy" for violations of the KCRA. Id. Thus, there can be no dispute that parties to a discrimination claim can appropriately

[12] This Court has also recognized that statements in pleadings and other communications filed or made in the course of judicial proceedings, including those leading up to the proceeding, "are absolutely privileged when material, pertinent, and relevant to the subject under inquiry[.]" Morgan v. Botts, 348 S.W.3d 599, 601 (Ky. 2011) (internal quotations omitted). See also Stilger v. Flint, 391 S.W.3d 751, 754 (Ky. 2013); Smith v. Hodges, 199 S.W.3d 185, 193 (Ky. App. 2005). The existence of this privilege supports Norton's position that Powell's alleged statement to Sherman in the course of attempting to resolve Aker's lawsuit should be inadmissible and should not be permitted to form the sole basis for a separate legal claim of retaliation.

discuss the possibility of reinstatement in settlement discussions.[13] Yet, under the Court of Appeals decision in this case, a lawyer defending an employer in a KCRA discrimination case would be, at a minimum, extremely reluctant to discuss issues of reinstatement for fear of spawning an additional retaliation claim against his client, or even against the lawyer personally.[14] Such a chilling effect on settlement discussions is anathema to Kentucky's strong public policy favoring robust and uninhibited settlement discussions.

There is substantial case law holding that statements or offers made in settlement discussions should not support a retaliation claim. See, e.g., Chapter 7 Trustee v. Gate Gourmet, Inc., 683 F.3d 1249, 1260 n.8 (11th Cir. 2012) (holding that settlement offers cannot ordinarily constitute retaliation); Gupta v. Florida Board of Regents, 212 F.3d 571, 589 (11th Cir. 2000) (failure to settle the plaintiff employee's discrimination claim itself cannot constitute an adverse employment action) (*overruled in part on other grounds by* Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008); Steffes v. Stepan Co., 144 F.3d 1070, 1076 (7th Cir. 1998) (holding that "litigation tactics for the most part will not give rise to actionable retaliation"); Hotchkiss v. CSK Auto, Inc., 949 F. Supp. 2d 1040 (E.D. Wash. 2013) (rejecting argument that settlement offer was anything more than an effort to resolve a dispute); Penny v. Winthrop-University Hosp., 883 F. Supp. 839 (E.D. NY 1995) (offer to convert a discharge to a suspension without pay and

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[13] Reinstatement may not be appropriate where there is "no position available or the employer-employee relationship [is] pervaded by hostility." Williams v. Pharmacia, Inc., 137 F.3d 944, 952 (7th Cir. 1998). Settlement discussion between parties is a reasonable way to explore such reinstatement issues.

[14] Employment discrimination claims under KRS 344.040 may be brought only against an employer. Retaliation claims under KRS 344.280(1), however, may be brought against any "person" who is alleged to have "retaliate[d] or discriminate[d] in any manner against a person ... because he has ... filed a complaint ... under this chapter."

reassignment, in exchange for a waiver and release of pending discrimination claims held not an adverse employment action); Kratzer v. Collins, 295 F. Supp. 2d 1005, 1017 (N. D. Iowa 2003) (negotiations for plaintiff to dismiss a civil rights suit constituted an "effort to compromise a claim" and could not be used as evidence of retaliation); Carney v. American Univ., 960 F. Supp. 436, 449 (D.D.C. 1997) (offers of compromise or settlement are not probative of discriminatory or retaliatory intent); Wilkinson v. Clark County Sch. Dist., 2010 U.S. Dist. LEXIS 131855, 4-5 (D. Nev. 2010) (holding that discussions surrounding offers of settlement negotiations for an existing discrimination claim may not be used as the basis for a retaliation claim).

Kentucky's courts have also held that actions taken during settlement discussions should not be used as the basis of a claim of retaliation for asserting the initial claim. In Bank One v. Murphy, 52 S.W.3d 540 (Ky. 2001), the Supreme Court considered whether a KCRA retaliation claim could be based upon an employer's decision to sue an employee after the employee had claimed discrimination and had initiated settlement discussions through counsel. Id. at 541. The employee, Murphy, had asserted a claim of discrimination internally but had not yet filed suit. Instead, the employee's attorney contacted the employer and initiated settlement discussions with the employer's attorney. Id. at 546. While those settlement discussions were ongoing, the employer filed suit against the employee seeking a declaration of rights as to its potential affirmative defense to the employee's underlying claim. Id. at 546. The Supreme Court rejected the employee's retaliation claim and held that "[i]t would be unwise for this Court to introduce limitations upon the rights of parties to seek declaratory relief." Id. at 546.

The Sixth Circuit decided a case with analogous facts in Dokes v. Jefferson County, 61 Fed. Appx. 174 (6th Cir. 2003). The court rejected a claim of Title VII retaliation arising from an employer's decision not to reinstate the employee after the employee sued. The employee in Dokes made a claim of discrimination, and the employer intended to reinstate her. In fact, the employer placed her in an interim position until the parties could come to a permanent solution concerning reinstatement. Id. at 177. When the settlement discussions about permanent reinstatement came to an impasse, the employee filed suit. Id. at 177. Two weeks later, the employer eliminated the interim position, and the employee claimed that this was retaliation for filing suit. Id. at 177. The Sixth Circuit recognized that the interim position "was obviously created to employ Dokes until negotiations regarding reinstatement were completed," and "[o]nce she filed suit the negotiations stopped." Id. at 180. The Sixth Circuit held that "[i]f an employer voluntarily pays a terminated employee pending negotiations to settle an underlying Title VII dispute, it is not Title VII retaliation to cease the voluntary payments when the settlement negotiations break down." Id. at 180. Continuing, the Sixth Circuit held, "[t]o hold otherwise would deter negotiated settlements." Id. at 180-181.

Instead of discouraging retaliation, the Court of Appeals holding in this case would discourage settlement discussions and would have a chilling effect on litigants' and attorneys' ability to engage in appropriate settlement discussions. This Court should, therefore, reverse the Court of Appeals' decision and hold that Powell's alleged statement to Sherman cannot support a claim of retaliation because it is inadmissible under KRE 408.

IV. AKER'S RETALIATION THEORY FAILS BECAUSE HE HAS NOT ESTABLISHED A *PRIMA FACIE* CLAIM.

Even if the alleged statement by Powell to Sherman is admissible as evidence, the Court of Appeals decision should still be reversed. Aker's one remaining claim is that Norton "retaliated" against him for filing the lawsuit by failing to hire him as part of a proposed settlement. The only proof of "retaliation" that Aker has offered is one attorney's statement to another attorney during a telephone call about resolving Aker's lawsuit. The statement is insufficient to form the sole basis of a KCRA retaliation claim.

Aker did not apply for, or otherwise seek, any particular job at Norton after filing this lawsuit. Rather, he wrongly contended that Norton was contractually obligated to provide him an unspecified job. Aker attempted to use this lawsuit as leverage to obtain a job via a settlement. As such, this is not a traditional "failure-to-hire" case; it is a "failure-to-settle" case, and Norton's rejection of Aker's settlement demand does not amount to a "materially adverse" action sufficient to state a KCRA retaliation claim. Brooks, 132 S.W.3d at 803.

The Court of Appeals erred by invoking the "futile gesture" doctrine to excuse Aker's failure to apply for a job. The doctrine is inapt in the distinct category of *retaliation* claims arising from the failure to hire. Further, even if the doctrine were to apply, it only excuses a plaintiff's failure to make a formal job application; it does not relieve a plaintiff of the obligation to identify an available job for which he was qualified and for which he would have applied absent the futility. Here, because Aker did not seek or identify any particular available job, the futile gesture doctrine cannot save his claim.

Finally, the Court of Appeals decision should be reversed for the independent reason that Aker failed to present sufficient evidence of causation. The U.S. Supreme

Court has held that Title VII retaliation claims require a heightened "but-for" standard of causation, rather than the lesser "motivating-factor" standard which applies to discrimination claims. University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 186 L.Ed. 2d 503 (2013).[15] To make a sufficient showing of causation, Aker must prove that Norton would have offered him a particular job, but for his filing the lawsuit. There is no evidence in the record to meet this heightened proof standard, and all of the evidence clearly refutes such a causation showing in this case. Accordingly, the Court of Appeals decision should be reversed for this additional reason.

A. General Standards Governing KCRA Retaliation Claims.

Claims under the KCRA's anti-retaliation provision, KRS 344.280(1), are analyzed consistent with retaliation claims under Title VII of the Federal Civil Rights Act of 1964. Brooks, 132 S.W.3d at 801-802. A *prima facie* claim generally requires a plaintiff to demonstrate four distinct elements: (1) that the plaintiff engaged in a protected activity; (2) that the defendant knew the plaintiff had engaged in the activity; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. Id. at 803.

An employer's failure to promote an existing employee can constitute retaliation under the KCRA. See Ky. Dep't of Corr. v. McCullough, 123 S.W.3d 130 (Ky. 2003); see also Kentucky Ctr. for Arts v. Handley, 827 S.W.2d 697 (Ky. App. 1991). The Court held that, "[i]n order to establish adverse treatment based on failure to promote in a retaliation case, the plaintiff must demonstrate that (1) she applied for promotion after

[15] United States Reports citation ("__ U.S. __") not yet available.

engaging in a protected activity and was qualified for the promotion, (2) she was considered for and denied the promotion, and (3) other employees of similar or lesser qualifications received promotions at the time the plaintiffs request for promotion was denied." McCullough, 123 S.W.3d at 135.

Distinguished from failure-to-promote cases, "claims of retaliation in the failure-to-hire context are ... rare." Thompson v. Austin Peay State Univ., 2012 U.S. Dist. LEXIS 120416, *40 (M.D. Tenn. 2012) (*quoting* Velez v. Janssen Ortho, LLC, 467 F.3d 802, 803 (1st Cir. 2006)). Neither the Kentucky courts nor the Sixth Circuit appears to have directly held that the failure to hire or to re-hire can constitute an adverse action for purposes of a Title VII (or corresponding KCRA) *retaliation* claim and, if so, under what circumstances. See Thompson, at *39-40 ("the Sixth Circuit has not appeared to address when a failure to hire can constitute an adverse action" in a retaliation claim). However, lower federal courts within the Sixth Circuit have recognized retaliation claims in the context of failure-to-hire, relying upon and adopting the First Circuit's holding in Velez, 467 F.3d 802. See Thompson, *supra* at *39-40; EEOC v. Wal-Mart Stores East, LP, 2014 U.S. Dist. LEXIS 34738, *8-9 (E.D. Ky. 2014) (*citing* Velez, 467 F.3d at 803 as "setting forth the elements for a retaliatory failure-to-hire case").

In Velez, the First Circuit held,

> Claims of retaliation in the failure-to-hire context are sufficiently rare that this question is one of first impression for this court. When a plaintiff makes such a claim, we conclude that the establishment of an "adverse employment action" requires a showing that (1) she applied for a particular position (2) which was vacant and (3) for which she was qualified. In addition, of course, she must show that she was not hired for that position.

Velez, 467 F.3d at 803. The standard in Velez is substantially the same as the standard for a failure-to-promote claim as articulated in McCullough, 123 S.W.3d at 135.

B. Aker Has Not Shown a Materially Adverse Employment Action.

Aker has not met the third element of a *prima facie* retaliation claim, which requires a plaintiff to show that he suffered an adverse action as defined under federal law. Id. at 802. In Brooks, the Court adopted the Sixth Circuit's holding that a plaintiff must "identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII." Id. at 802 (*quoting* Hollins v. Atlantic Co., Inc., 188 F.3d 652, 662 (6th Cir. 1999)). Here, as the Circuit Court held, there was no *change* in the terms or conditions of Aker's employment after he filed the lawsuit. Aker's employment had already been terminated several months before he filed the lawsuit against Norton, and Norton had no obligations to Aker. At the time of the telephone call, Aker was simply attempting, through counsel, to use his newly filed lawsuit as a means to persuade Norton to offer him an unspecified job as part of a settlement. When Norton declined to acquiesce to Aker's demand, the status quo was maintained; there was no "materially adverse *change* in the terms and conditions" of Aker's employment. Id. at 802 (emphasis added).

Since this Court's holding in Brooks, *supra,* the U.S. Supreme Court modified the standard for what constitutes a materially adverse action in a Title VII retaliation case. Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (2006). In Burlington, the Court established an objective test requiring that, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or

supporting a charge of discrimination." Id. at 68 (citations and internal quotation marks omitted). Emphasizing that "[c]ontext matters," the Court explained that its phrasing of the standard in general terms was "because the significance of any given act of retaliation will often depend upon the particular circumstances." Id. at 69.

In formulating this fact-specific standard, the Court was guided by the purpose of the anti-retaliation provision, "to prevent employer interference with unfettered access" to remedial mechanisms "by prohibiting employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers." Id. at 68 (internal citations and quotation marks omitted). Thus, the Burlington focuses on the perspective of "a reasonable person in the plaintiff's position" and whether the complained-of action is "likely to dissuade employees from complaining or assisting in complaints about discrimination." Id. at 69-70.

Here, the Burlington standard does not support Aker's retaliation claim. The factual context of Aker's claim must be taken into account. Id. At the time of the alleged retaliation, Aker's employment had already been terminated, he had filed this lawsuit against Norton, and he was attempting to settle the suit in exchange for an unspecified job. His theory is that the "adverse action" was Norton's failure to accept the settlement proposal. Analyzed in proper context, such a theory is not sufficient to constitute a materially adverse action under the Burlington standard. A reasonable person in Aker's position would not be "dissuaded" from filing suit, knowing that his former employer would not accept such a settlement offer. Id. at 69-70. It is not objectively reasonable for a recently terminated employee to expect that filing a lawsuit will enable him to successfully demand to be hired in another unspecified job in exchange for dismissal.

Norton's rejection of Aker's settlement demand does not rise to the level of a materially adverse action.

This conclusion is also supported by substantial case law holding that settlement efforts and discussions generally cannot constitute sufficient adverse action to support a retaliation claim. See, e.g., Dokes, 61 Fed. Appx. at 180-181 ("[i]f an employer voluntarily pays a terminated employee pending negotiations to settle an underlying Title VII dispute, it is not Title VII retaliation to cease the voluntary payments when the settlement negotiations break down" because "[t]o hold otherwise would deter negotiated settlements."). See also Gupta, 212 F.3d 571. In Gupta, the Eleventh Circuit held that an employer's refusal to settle a Title VII dispute cannot support a retaliation claim.

> To begin with, an employer is not legally required to attempt to settle an employee's Title VII claim at all. Any action or inaction in regard to settlement of a claim cannot be retaliation for making the claim in any meaningful sense, because every action or inaction in regard to settlement of the claim is caused by the claim. The anti-retaliation provisions of the various job discrimination statutes are aimed at preventing the employer from punishing the employee by making job conditions worse. The failure to settle a claim for whatever reason does not make job conditions worse as a result of the claim having been made.

Gupta, 212 F.3d at 589-590 (internal quotation marks and citations omitted).

The same result is warranted in this case. This is not a failure-to-hire case in which Aker applied for a job and was rejected. This is a failure-to-settle case in which Aker's attorney requested that he be given an unspecified job in exchange for dismissal of his lawsuit. Norton's failure to acquiesce to Aker's settlement demand is not a materially adverse action for purposes of a KCRA retaliation claim. Aker has failed to establish a *prima facie* KCRA retaliation claim, and the Court of Appeals decision as to that claim should be reversed.

C. The Futile Gesture Doctrine Does Not Apply In Retaliatory Failure-to-Hire Cases.

The Court of Appeals erred in both its invocation and application of the "futile gesture" doctrine to Aker's claim. The futile gesture doctrine applies in limited circumstances, typically in failure-to-promote cases to excuse a would-be applicant's failure to formally apply for the job in question. As the Sixth Circuit has held, the doctrine excuses a plaintiff's failure to apply for a position only when the plaintiff presents "overwhelming evidence of pervasive discrimination in all aspects of the employer's internal employment practices," and shows that "any application would have been futile and perhaps foolhardy." Kreuzer v. Brown, 128 F.3d 359, 364 n.2 (6th Cir. 1997) (*quoting* Harless v. Duck, 619 F.2d 611, 617-18 (6th Cir. 1980)). Aker attempted no such showing here.

Moreover, even if the futile gesture doctrine could excuse Aker's failure to formally *apply* for a job, the doctrine cannot excuse Aker from his obligation to *identify* an available job opening for which he was qualified and for which he would have applied in the absence of futility. Even when applying the futile gesture doctrine, courts still uniformly require a plaintiff to identify an available job for which he was qualified. Aker's failure to do so vitiates his *prima facie* retaliation claim.

i. *The Futile Gesture Doctrine Excuses only the Formal Application Requirement and not the Requirement to Show an Available Job Opening.*

The futile gesture doctrine draws its origins from Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) ("Teamsters"). In Teamsters, the Court held that Title VII class action claims could be brought by the government on behalf of minority employees victimized by an employer's and union's established discriminatory

promotion and seniority system. The case largely centered around two types of jobs, "line driver" and the less desirable job of "city driver." Id. at 329-330. The government sought injunctive relief and specific "make whole" relief for all individual victims of discrimination, which would allow them an opportunity to transfer to line-driver jobs with full company seniority for all purposes. Id. at 330.

Many of the minority city drivers never formally applied to be promoted to line driver because the discriminatory promotion practices were widely known. Id. The Court held that "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." Id. at 365-366. Thus, the Court held that a formal application was not necessarily required for an individual to claim discriminatory failure-to-promote. Yet, in remanding the case for trial as to individual relief for the victims of discrimination, the Court held that any individual who did not apply for promotion still has "the not always easy burden of proving that he would have applied for the job had it not been for" the discriminatory practices. Id. at 367-368; see also id. at 371. The Court also made clear that, on remand, the lower court would still "have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices." Id. at 371-372. Further, the Court held,

> Because the class of victims may include some who did not apply for line-driver jobs as well as those who did, and because more than one minority employee may have been denied each line-driver vacancy, the court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members.

Id. at 372 (emphasis added). Thus, the Court recognized that relief must be limited to actual victims of discrimination who prove that they would have been entitled to be promoted to one of a limited number of specific job vacancies.

Apart from class action pattern-and-practice cases such as Teamsters, the rules governing individual discriminatory failure-to-hire cases are fairly straightforward. A *prima facie* claim in a typical failure-to-hire case requires a plaintiff to establish that there was an available position for which he was qualified, that he applied for the available position or that "the employer was otherwise obligated to consider him," and that the position went to an individual outside the protected class. Wanger v. G.A. Gray Co., 872 F.2d 142, 145 (6th Cir. 1989).

Here, instead of applying or claiming "futility," Aker took the alternative position under Wanger, that Norton was contractually obligated to consider him for a job because of the Grievance Team's recommendation. Aker's position turned out to be incorrect, and thus Norton had no obligation to consider Aker for re-employment in the absence of an employment application. Id. at 146 (*citing* Payne v. Bobbie Brooks, Inc., 505 F. Supp. 707, 716-17 (N.D. Ohio 1980)). The Court of Appeals majority held that the telephone call from Sherman to Powell in which Sherman expressed Aker's interest in being considered for an unspecified position with Norton sufficed for the application requirement under the circumstances. Yet, Sherman merely expressed a generalized interest in Aker being considered for "a position" in exchange for the dismissal of his lawsuit. (Sherman Aff., Exh. 3, 3/6/08 ltr.) Such a "generalized expression of interest" in being employed does not suffice for the application requirement. Id. at 147 (*citing* Williams v. Hevi-Duty Elec. Co., 819 F.2d 620 (6th Cir. 1987)).

Even in cases where the futile gesture doctrine might otherwise apply, courts still reject failure-to-hire or failure-to-promote claims in which the plaintiff, like Aker, has not identified a particular available job for which he was qualified. In the absence of futility, there are important reasons to require a plaintiff to show that he applied for a job. As underscored by the U.S. Supreme Court's holding in Teamsters, 431 U.S. at 372, there are equally important reasons why a plaintiff should *always* be required to show that a particular job opening existed for which he was qualified. In the absence of such a showing, the inquiry is purely hypothetical, unworkable and places an impossible burden on the employer to prove a negative.

Aker's failure to identify any job opening for which he sought to be hired forecloses his ability to make a futility argument. Only with the identification of a particular job opening could it be determined whether Aker was qualified for the position, whether the position was available, or whether others outside of the protected category with lesser qualifications received the position. See Wanger, 872 F.2d at 145; McCullough, 123 S.W.3d at 135. Likewise, for purposes of claiming any damages, only if a particular job opening were identified, could it be determined whether such a job is full-time or part-time, hourly or salaried, and what benefits and compensation are attached to such a job.

In Teamsters and in each of the other futile gesture doctrine cases cited in the Court of Appeals opinion in this case,[16] the non-applicant plaintiffs identified the particular vacant positions to which they sought to be hired or promoted. See Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985) (gender discrimination claims arising from

[16] See Court of Appeals Op. of 7/5/13 at pp. 16-17.

failure to hire women in meat-cutter positions); Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980) (gender discrimination claim arising from failure to promote plaintiff to Director of Investment Relations, where employer's practice was to promote internally without applications); Daniels v. UPS, 701 F.3d 620 (10th Cir. 2012) (rejecting futile gesture argument in gender discrimination claim arising from failure to promote to supervisor position); Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999) (disability discrimination claim arising from policy refusing to reassign disabled police officers to particular Career Service positions); see also, e.g., Owens v. Wellmont, Inc., 343 Fed. Appx. 18, 25 (6th Cir. 2009) (applying futile gesture doctrine in age discrimination claim where plaintiff "did more than make a generalized expression of interest in working for" the employer because plaintiff expressed interest in a specific open position).

In Brown v. Coach Stores. Inc., 163 F.3d 706 (2d Cir. 1998), the Second Circuit affirmed the dismissal of a plaintiff's race discrimination complaint for failure to allege "that she made some specific effort to apply for a particular position or positions." Id. at 710. The court noted that, even if the plaintiff had established that the defendant's discriminatory practices would have made an application futile, the plaintiff's complaint would still be dismissed because she "failed to allege the specific positions to which she would have applied had the alleged discriminatory practices not existed." Id. at 711. The Brown court cited the Supreme Court's holding in Teamsters, 431 U.S. at 368, that a non-applicant in a situation in which an application would have been futile must still meet the "not always easy burden" of showing that she "would have applied for the job" but for the discriminatory practices of the employer, but the court held that "[t]his language requires a plaintiff to do more than simply say, as has Brown, that she would have applied for

dozens of unspecified positions but for the discriminatory atmosphere." Brown, 163 F.3d at 712 n.3.

Kentucky case law also supports requiring a plaintiff in a failure-to-hire claim to identify a particular job vacancy, even in the absence of a formal application. Prior to the Court of Appeals decision in this case, the futile gesture doctrine appears to have been applied in virtually no Kentucky appellate court decisions. The Court of Appeals implicitly applied the doctrine in Hardison v. Acordia of Ky., Inc., 2006 Ky. App. Unpub. LEXIS 635, *11-14 (Ky. App. 2006) (unpublished).[17] Hardison involved an employee's claim that she was passed over for promotion because of her gender and age. Id. The employer argued that her failure to submit formal applications for the promotion was fatal to her *prima facie* claim. Id. The Court of Appeals wrote that "[c]ourts have generally held that the failure to formally apply for a job opening will not bar a Title VII plaintiff from establishing a prima facie claim of discriminatory hiring, as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer." Id. (*quoting* E.E.O.C. v. Metal Serv. Co., 892 F.2d 341, 348 (3rd Cir.1990)) (emphasis added). The plaintiff in Hardison sought promotion to a specific commercial lines insurance agent job, and there was evidence that the company had several such positions available during the time that the plaintiff asked the company's managing director for such a job on "multiple occasions." Id. at *3. There was also no evidence that the company had any formal application process for those seeking such promotions. Id. at *13-14.

[17] A copy of the decision is attached at App'x Tab 5.

None of the facts of Hardison is present in this case. Here, Aker knew very well that Norton utilizes a formal application process for job seekers. Aker had gone through the application process to be initially hired and several times again as an unsuccessful internal applicant in the fall of 2007 during his administrative leave. In contrast to the plaintiff in Hardison, who clearly sought a specific job, Aker made no inquiry to be hired into a particular position, and he has not identified any available position that he sought.

Even if the futile gesture doctrine applied to Aker's claim, the doctrine would only excuse Aker's failure to *apply* for a position, not his failure to identify a position in which he was interested and for which he was rejected. Thus, Aker failed to make a *prima facie* retaliation claim, and the Court of Appeals decision on that claim should be reversed.

ii. *The Futile Gesture Doctrine Does Not Apply in Retaliatory Failure-to-Hire Claims.*

The Court of Appeals erred by invoking the futile gesture doctrine in Aker's retaliatory failure-to-hire claim. The futile gesture cases cited by the Court of Appeals in this case were all Title VII *discrimination* claims, not *retaliation* claims, and they primarily arose from the failure to promote existing employees, not the failure to hire external applicants (or non-applicants). There is little case law supporting retaliation claims in the failure-to-hire context, but the existing case law strongly suggests that the futile gesture doctrine does not apply in such claims.

Many elements of Title VII and KCRA retaliation claims are treated the same as discrimination claims. However, important distinctions exist between the two kinds of claims. See, e.g., Nassar, 133 S.Ct. 2517, 186 L.Ed. 2d 503 (setting forth different standards of causation for retaliation and discrimination claims); Burlington,

548 U.S. at 63 (explaining how anti-discrimination and anti-retaliation provisions of Title VII "differ not only in language but in purpose as well.").

Likewise, there are important distinctions between cases arising from the failure to hire an external applicant and cases arising from adverse actions taken against existing employees. The Kentucky Court of Appeals recognized such distinctions in Baker v. Campbell County Bd. of Educ., 180 S.W.3d 479, 483 (Ky. App. 2005). In Baker, the court declined to extend the common law tort of public policy wrongful discharge created in Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1983), to encompass a claim for retaliatory failure to hire. The court held that "it is logical that public policy would afford more protections to an employee than to a prospective employee" because "the existence of an established relationship between an employer and an employee creates certain expectations of conduct and trust that simply do not exist between an employer and a job applicant." Baker, 180 S.W.3d at 484. Such practical distinctions between employees and job applicants also help to explain why the futile gesture doctrine has been applied primarily in the context of discriminatory failure-to-promote claims and not in retaliatory failure-to-hire claims.

The two district courts within the Sixth Circuit which have recognized a claim of retaliatory failure-to-hire under Title VII have adopted the First Circuit's holding in Velez, 467 F.3d 802. See Thompson, 2012 U.S. Dist. LEXIS 120416, *39-40; EEOC v. Wal-Mart Stores East, LP, 2014 U.S. Dist. LEXIS 34738, *8-9 (E.D. Ky. 2014). The holding in Velez is particular to claims of retaliatory failure-to-hire, and it effectively forecloses the application of the futile gesture doctrine in such cases.

This case and Velez share similar facts. The plaintiff, Velez, claimed that her former employer refused to consider her for re-employment in retaliation for her having filed a lawsuit against the company alleging sexual harassment. Id. at 803-804. Velez sent a certified letter and resumé to the human resources department, requesting consideration for employment in "any position available" for which she was qualified, including a specific list of various job categories. Id. at 804. One week later, Velez faxed an identical letter and resumé to the human resources department. Id. The human resources director responded, stating that Velez would not be considered for an interview or for "rehiring" because of her prior separation from the company and the company's "business needs." Id. at 804-805. The human resources director later testified that he had consulted with one of the company's lawyers prior to finalizing and sending the rejection letter and that he typically sent no response to rejected applicants. Id. at 805. Three days after the rejection letter, the company advertised in the local newspaper for two particular positions for which Velez claimed to be qualified. Id. at 805.

The Velez court rejected the argument that the plaintiff's letters to the human resources department sufficed as job applications, holding,

> We are not suggesting that there was a complete absence of a job application in this case. But Velez only sent two general letters in August 2001 expressing interest in any available job. Guided by some precedents from the other circuits, we conclude that such general letters ordinarily cannot be the predicate for the adverse employment action prong in a retaliatory failure-to-hire case. Instead, a plaintiff alleging such a claim must show that (1) she applied for a particular position (2) which was vacant and (3) for which she was qualified. In addition, she must show that she was not hired for that position.

Id. at 807. Observing that retaliatory failure-to-hire cases are very rare, the Velez court examined numerous precedents involving somewhat analogous claims of the failure to

promote. Id. at 807-808 (collecting cases). For retaliatory failure-to-hire cases, the court adopted what it called a "specificity requirement,"

> This specificity requirement is sensible and fair. An open-ended request for employment should not put a burden on an employer to review an applicant's generally stated credentials any time a position becomes available, at the risk of a Title VII claim. If we were to find such a general request the legal equivalent of an application, we would require employers to answer for their failure to hire individuals who did nothing more than express a desire to be employed. ... A failure-to-hire claim obviously depends on the availability of a job opening. It is not unfair or unduly burdensome to expect a plaintiff to submit an application for that vacancy as a prerequisite for stating a failure-to-hire claim. In short, we do not believe an employer is obliged to defend its decision not to hire an individual for a position for which she has not specifically applied.

Velez, 467 F.3d at 808.

The Velez court held that the plaintiff failed to make a *prima facie* showing of an adverse action because her letters stated only that she was "interested in being considered for any position available such as manufacturing supervisor, warehouse supervisor, maintenance supervisor, utilities supervisor, quality engineer, preventive maintenance supervisor or any other position." Id. at 808. The court held that "[s]uch a letter merely expresses interest in a wide range of positions," and "is not the application for a discrete, identifiable position required under § 704(a) of Title VII." Id. at 808-809.

This holding in Velez is not an anomaly. With varying degrees of analysis relating to the futile gesture doctrine, courts in failure-to-hire cases uniformly require a plaintiff to specify the available job for which he was qualified and would have applied. See, e.g., Morgan v. Fed. Home Loan Mortg. Corp., 328 F.3d 647, 651 (D.C. Cir. 2003) (holding that plaintiff claiming a retaliatory failure-to-hire must show "that he applied for an available job; and . . . that he was qualified for that position") (emphasis added); Pina v. Children's Place, 740 F.3d 785 (1st Cir. 2014) (rejecting retaliatory failure to hire

claim because plaintiff "bore the burden of establishing the existence of a vacant position; [defendant] was under no obligation to prove the non-existence of a vacancy"); EEOC v. Metal Serv. Co., 892 F.2d 341, 348-49 (3d Cir. 1990) (accepting futile gesture doctrine "as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer") (emphasis added); Kelly v. Drexel Univ., 907 F. Supp. 864, 878 (E.D. Pa. 1995) (holding that plaintiff's letter to employer inquiring about appropriate job openings was insufficient to sustain a failure-to-rehire claim); Hotchkiss v. CSK Auto Inc., 918 F. Supp. 2d 1108, 1126-27 (E.D. Wash. 2013) (holding that formal application was unnecessary in a failure-to-rehire claim where plaintiff called multiple managers seeking a specific open position).

Under the First Circuit's standard in Velez and under the other prevailing law in failure-to-hire cases, Aker cannot maintain a *prima facie* retaliation claim in this case because he did not apply for any particular position and has not even identified any particular position that was available and for which he was qualified. The futile gesture doctrine does not apply in this case, and it cannot excuse Aker's failure to identify a particular job that was available and for which he was qualified. Thus, the Court of Appeals decision as to Aker's retaliation claim should be reversed.

D. Aker Failed to Establish the Causation Element Required for a *Prima Facie* Retaliation Claim.

The fourth element of a *prima facie* claim of retaliation requires a plaintiff to show that there was a causal connection between the protected activity and the adverse employment action. Brooks, 132 S.W.3d at 803. Retaliation claims require a heightened "but-for" standard of causation rather than the lesser "motivating-factor" standard which applies to discrimination claims. Nassar, 133 S.Ct. 2517, 186 L.Ed. 2d 503.

Establishing such a causal connection between the protected activity and the adverse employment action requires "proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Nassar, 133 S.Ct. at 2533-34. "Ultimately, [a plaintiff] will have to 'establish that . . . her protected activity was a but-for cause of the alleged adverse action by the employer.'" Montell v. Diversified Clinical Servs., 757 F.3d 497, 504 (6th Cir. 2014) (*quoting* Nassar, 133 S.Ct. at 2534). Here, Aker has not met, and cannot meet, this heightened causation showing.

The claimed adverse action is Norton's failure to hire Aker after his employment was terminated and after he filed the lawsuit. Thus, Aker would be required to prove that his filing the lawsuit is the "but for" cause of Norton's failure to offer him a job. In other words, Aker would have to prove that, had he not filed the lawsuit, Norton would have offered him a particular job several months after Norton had lawfully terminated his employment. Aker can make no such showing, particularly where Aker did not apply for any job and has not even identified any available job for which he was qualified.

Actually, Aker's factual allegations in this case completely *foreclose* the argument that, in the absence of his filing the lawsuit, a job with Norton was otherwise imminent or inevitable. The very reason that Aker filed the lawsuit was because his efforts to find a job prior to filing suit had been unsuccessful. That fact is made abundantly clear in Sherman's affidavit. Sherman sent a December 21, 2007 letter to Norton's human resources department on Aker's behalf, complaining that Aker had "waited an inordinate amount of time to be advised as to when he may return to work ..." (Sherman Aff at Exh. 1, 12/21/07 ltr.) Between Powell's January 11, 2008 letter to Sherman and Aker's filing of the lawsuit on February 27, Aker had made "several

attempts to contact Norton" about being hired, and it was Aker's lack of success that motivated him to file the lawsuit. (Id. at ¶ 6.) Sherman's March 6, 2008 letter alludes to Aker's frustrated pre-suit attempts: "He [Aker] did as you directed him, left three unreturned messages and went to the office of a Mr. Jeffrey, waited again and left his name and phone number. No response." (Sherman Aff. at Exh. 3, 3/6/08 ltr.)

The reality is that Aker filed the lawsuit as a *means* to obtain a job with Norton. Yet, in order to establish the causation element for his retaliation claim, Aker must now take the completely opposite position and argue that his filing the lawsuit was the only *obstacle* to his obtaining a job with Norton. That is obviously not the case. Aker cannot prove that his filing the lawsuit was the "but-for" cause of his not obtaining an unspecified, hypothetical job at Norton, a job for which he never applied and the very existence of which is not supported by any evidence.

Further, while Sherman's affidavit attempts to attribute a retaliatory animus to Powell/Norton, it does not cure the obvious and fatal defect in the causation element of Aker's retaliation claim. The affidavit itself makes clear that any job offer for Aker was far from imminent. Sherman's affidavit and corresponding March 6, 2008 letter to Powell both speak in terms of whether Norton would *consider* Aker for a position if he dismissed his lawsuit; there is no suggestion or proof that Norton would actually have *hired* Aker for any position if he dismissed the suit or if he had not filed it in the first place. (Sherman Aff. at ¶ 7) ("Powell stated that because Mr. Aker had filed suit against Norton, Norton would not consider him for a position, even if I could convince Mr. Aker to dismiss the case filed pro se"); (id. at Exh. 3, 3/6/08 ltr) ("... you said because Mr.

Akers [sic] filed suit you will not consider him for a position, even if he were to dismiss the case he filed pro-bono [sic]") (emphasis added).

To make a valid retaliation claim, Aker is required to prove that his filing this lawsuit was the "but-for" cause for Norton not hiring him; even if Aker could prove that retaliation was a "motivating factor" for the decision, that is not enough. Nassar, 133 S.Ct. at 2534. There is no evidence in the record to meet this heightened causation standard, and all of the evidence conclusively rebuts such a showing of causation. Accordingly, the Court of Appeals decision should be reversed for this additional reason that Aker failed to establish the required causation element of a *prima facie* claim.

CONCLUSION

For all the reasons set forth herein, the Court should reverse the Court of Appeals decision as to Aker's one and only remaining KCRA retaliation claim.

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